# Position paper for EU Member States on applying Council Regulation (EU) 2022/2577 to accelerate the deployment of renewable energy

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Council Regulation (EU) 2022/2577 of 22 December 2022 rightly aims to accelerate the deployment of renewable energy. But although it contains some useful provisions, it raises serious concerns about the legal basis used for its adoption, the extent to which it addresses the real barriers to renewables, and its backdoor changes to EU environmental law.

The Regulation was adopted by the Council under Article 122 of the Treaty on the Functioning of the European Union (TFEU), which is part of the section on economic and monetary policy, and does not involve consulting the European Parliament. But according to Article 192 of the TFEU, EU environmental law is to be adopted using the ordinary legislative procedure. Although Article 192 does foresee exceptions, none of them apply in this case. Thus, the legal basis for the Regulation is questionable.

Although Articles 4 and 7 of the Regulation may serve a useful role in speeding up the deployment of small-scale solar and heat pumps, the Regulation also contains provisions – Articles 3, 5 and 6 – which contravene current EU environmental legislation and the Aarhus Convention, and therefore also national legislation (see below).

This is particularly unacceptable because the Regulation is not well targeted. It states that it has *'a particular focus on specific renewable energy technologies or types of projects which are capable of achieving a short term acceleration of the pace of deployment of renewables in the Union'*, but in reality loosens the rules for all

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kinds of renewable energy projects, including those such as forest biomass and new hydropower, which have significant high environmental impacts and cannot contribute much to a short-term acceleration.

In principle, a Regulation should be directly applicable without transposition, but given the clashes with EU law and the Aarhus Convention, as well as the considerable flexibility the Regulation gives to Member States in how to apply it, attempting to do so will almost certainly lead to legal uncertainty and numerous court challenges.

We understand that the European Commission is currently producing Guidance on some aspects of the Regulation, which we look forward to. However, we believe that more independent input for Member States is also needed.

This paper therefore provides our view on how Member States should apply the Regulation.

Member States should recall that Article 193 of the TFEU states that *'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.'*

Thus Member States cannot be penalised for merely upholding existing EU environmental law. What is needed is to strike a balance between speeding up sustainable forms of renewable energy, applying EU environmental law and preventing legal uncertainty. At the same time, the precautionary principle must also be applied in order to enable the EU to meet its 2030 biodiversity targets such as the restoration of 25,000 kilometres of free-flowing rivers and the legal protection of a minimum of 30 per cent of the EU's land and sea areas.

## 1. Adherence to the Aarhus Convention - Recital (20)

Recital (20) of the Regulation states that the Aarhus Convention remains applicable:

> *The provisions of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention') regarding access to information, public participation in decision-making, and access to justice in environmental matters, and in particular, the obligations of Member States relating to public participation and to access to justice, remain applicable.*

Moreover, Article 216 of the TFEU also confirms the primacy of international law over EU law.[1]

As the Aarhus Convention requires effective public participation in decision-making on individual projects, plans and programmes and environmental law at a stage when options are still open, this raises at least two issues for the implementation of the Regulation:

1) By their nature, Regulations do not require transposition by Member States. So how should the direct applicability of the Regulation be reconciled by the Aarhus Convention's requirement (Art.8)

[1] Also confirmed by CJEU Judgment of the Court (Grand Chamber) of 21 December 2011, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Case C-366/10, paragraph 50, ECLI:EU:C:2011:864.

for effective public participation in decision-making on executive regulations and/or generally applicable legally binding normative instruments?

**Recommendation 1**: Any changes to Member State environmental permitting procedures made as a result of the Regulation need to be set out in legal acts subject to the applicable procedures at the national level, including public participation.

2) Article 3 and 6 of the Regulation both curtail public participation in decision-making on the project level in various ways, in breach of Article 6 of the Aarhus Convention.

Article 3 does this by 'presuming' that renewable projects are of 'overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council, and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council. Thus, it stacks these derogation assessments in favour of the investor, and rendering it unclear to what extent public participation can be effective.

Article 6 does so by allowing Member States to exempt projects in dedicated renewable or grid areas from the EIA procedure if the relevant plan or programme has been subject to an SEA.

For our specific recommendations on these Articles, please see below.

## 2. Technology focus - Article 1

The Regulation claims to focus on renewable energy projects which can make an increased contribution in the short term:

> *This Regulation establishes temporary rules of an emergency nature to accelerate the permit-granting process applicable to the production of energy from renewable energy sources, with a particular focus on specific renewable energy technologies or types of projects which are capable of achieving a short term acceleration of the pace of deployment of renewables in the Union.*

However, while this may be the case for Articles 4 and 7 on small-scale solar and heat pumps, the Regulation allows – **but does not require** – the provisions which weaken existing environmental law to be applied to any technologies, including those with significant environmental impacts, such as biomass combustion, hydropower, or wind power in areas of importance for birds.

Moreover, hydropower and biomass can at most make only a minor additional contribution to the EU's energy mix in the medium-long term. Much of the EU's hydropower potential has been exploited, and generation even decreased in the EU between 2012 and 2021,[2] presumably due to the impacts of climate change. Climate change is likely to further decrease the effectiveness of hydropower in many parts of the EU in the coming years, particularly in the southern countries.[3]

[2] Eurostat, NRG_IND_PEHNF last update: 10/02/2023

[3] European Environment Agency, Adaptation challenges and opportunities for the European energy system

Building a climate-resilient low-carbon energy system, EEA Report No 1/2019, 2019.

In addition, the EU Biodiversity Strategy aims at restoring 25,000 kilometres of rivers to be free-flowing by 2030 – a goal which cannot be achieved if significant new greenfield hydropower capacity is built.

The combustion of primary solid biofuels in the EU somewhat increased between 2012 and 2021,[4] but the inclusion of forest biomass as a renewable energy source in the EU is coming under increasing scrutiny, due to the urgency of the climate emergency.

Trees that could act as a carbon sink replacing biomass burnt now will take decades to grow – if they grow at all – yet the IPCC has made it clear that global emissions need to peak by 2025 and decrease by 43 per cent by 2030 if we are to stand any chance of limiting climate change to 1.5 degrees Celsius by the end of the century.[5] In February 2021, more than 500 scientists wrote to EU Commission President Von der Leyen and others, asking governments to end incentives for wood-burning and for the EU to stop treating the burning of biomass as carbon neutral in its renewable energy standards and its emissions trading system.[6]

The EU has not yet adequately responded to the need to reduce forest biomass use, primarily due to pressure from industry lobbies and biomass-heavy Member States, but in the coming years we still expect increasing restrictions on forest biomass combustion.

**Recommendation 2**: Any changes to Member State environmental permitting procedures made as a result of the Regulation must be restricted to those that will not have a significant environmental impact, such as small-scale solar and heat pumps, and which can make a relatively quick contribution to ramping up renewable energy use.

*The Brežice hydropower plant on the river Sava in Slovenia. Photo taken by the author*

[4] Eurostat, NRG_CB_RW, last update: 30/01/2023

[5] Intergovernmental Panel on Climate Change, The evidence is clear: the time for action is now. We can halve emissions by 2030, 4 April 2022.

[6] WWF European Policy Office, 500+ scientists tell EU to end tree burning for energy, 11 February 2021.

## 3. Applicability to ongoing permit granting processes - Article 1

In order to achieve a maximum impact in the shortest time possible, the Regulation states that:

> *This Regulation applies to all permit-granting processes that have a starting date within the period of its application and is without prejudice to national provisions establishing shorter deadlines than those laid down in Articles 4, 5 and 7.*
>
> *Member States may also apply this Regulation to **ongoing permit granting processes** which have not resulted in a final decision before 30 December 2022, provided that this shortens the permit granting process and that pre-existing third party legal rights are preserved.* (Our emphasis)

However, it is doubtful that third-party legal rights, such as those enshrined in the Aarhus Convention, can be preserved in cases when the permitting procedure for a project with significant environmental impacts is changed after the procedure has started. Exempting projects from an EIA procedure, reducing the scope of an EIA for a repowering project, or 'presuming' a project to be of overriding public interest after the permitting process has started raises the risks of legal challenges against the decisions taken, due to the fact that the existing legislation is still in place in parallel with the Regulation.

**Recommendation 3**: We do not recommend applying the Regulation to ongoing permitting processes at all. If this is done, however, it must not apply to projects which may have a significant environmental impact and which would normally require an EIA or an Appropriate Assessment.

Furthermore, it is not clearly specified what constitutes an 'ongoing permit granting process' in the context of project permitting decisions which are subject to legal challenges. In cases where a successful legal challenge has been mounted against a decision to approve e.g. an environmental impact assessment for a renewable energy project, or a derogation under 4(7) of the Water Framework Directive under existing legislation, and the competent authorities have been ordered to make the decision again, there is ambiguity on whether the pre-existing national permitting rules should be used, or the new Regulation.

**Recommendation 4:** National permitting authorities must avoid 'changing the goalposts' for specific projects. If a successful legal challenge has been mounted against a permitting decision and the competent authorities have been ordered to make the decision again, they need to do so under the pre-existing legislation, not the new Regulation.

## 4. Overriding public interest - Recital (8) and Article 3

One of the least clear provisions in the Regulation, with the most potential for legal uncertainty, is Article 3, which states:

> *1. The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be **presumed** as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC (5), Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council (6) and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council (7). **Member States may restrict the application of those provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans**.*

> *2. Member States shall ensure, at least for projects which are recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development **are given priority** when balancing legal interests in the individual case. Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.' (Our emphasis).*

Recital (8) underlines that this **'presumption' does not mean that a project is automatically to be considered of overriding public interest** and serving public health and safety:

> *One of the temporary measures consists of the introduction of a rebuttable presumption that renewable energy projects are of overriding public interest and serving public health and safety for the purposes of the relevant Union environmental legislation, except where there is clear evidence that those projects have major adverse effects on the environment which cannot be mitigated or compensated for.*

In fact, it is not clear how Article 3 will significantly contribute to the speeding up of renewable energy projects in the EU, because it only applies to a small number of projects with a very significant environmental impact that would not already be able to go ahead without a derogation under the Habitats, Birds or Water Framework Directives.

Where derogations are allowed under Article 6(4) of the Habitats Directive, compensation measures also have to be taken, and should be in place, fully operational and effective before the damage on the site occurs[7] – a process which may take years.

Under the existing legislation, many projects which undergo examinations such as the Appropriate Assessment are able to go ahead, either because they do not have a significant impact on the site in question or because they are allowed to go ahead – despite significant impacts – after assessments under the derogation clauses in these Directives.

Moreover, Article 3 will not even contribute significantly to speeding up decisions on derogations under the Habitats, Birds and Water Framework Directives because **it does not exempt projects from having to undergo assessments such as the appropriate assessment**.

The Habitats, Birds and Water Framework Directives all require different tests to carry out in order to decide whether derogations are allowed, so it will still have to be demonstrated that e.g. there are no alternatives to the project in question. Moreover, examinations of whether there is '*clear evidence that those projects have major adverse effects on the environment which cannot be mitigated or compensated for*' will still be needed.

In addition, as mentioned above, the provisions of the Aarhus Convention still need to be applied. But it is far from clear how effective public participation can be ensured when renewable energy projects have the cards stacked in favour of them by being 'presumed' to be of overriding public interest and by having to be

[7] European Commission, Commission notice, Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, p.84.

'given priority' when balancing legal interests. In such a scenario, it does not seem likely that the decision-making will be very objective – again raising the threat of legal challenges.

Another issue is how Member State authorities can guarantee the effectiveness of the provision on appropriate species conservation measures in practice. The results and therefore appropriateness of species conservation measures will be visible only years after the renewable energy project is built. There is a strong danger that an investor pledges to take such measures but they prove ineffective, or are not carried out to the planned extent, but the renewable energy plant is already built by then. Therefore allowing projects to go ahead based on such measures is hardly in line with the precautionary principle.

**Recommendation 5:** Given that Member States may restrict the application of the provisions of Article 3, we recommend:

- Not applying Article 3 at all, based on the precautionary principle and proper application of the Aarhus Convention's provisions on ensuring *effective* public participation, or

-Restricting it to technologies which are not likely to have significant harmful impacts, such as small-scale solar installations and heat pumps - however these would not need derogations anyway.

**Recommendation 6:** It must be underlined that even if Article 3 is applied, it does not exempt projects from being subject to the individual derogation criteria under the Habitats, Birds and Water Framework Directives.

## 5. EIAs for repowering projects - Article 5

Repowering of existing plants has significant potential to ensure that the EU's renewable energy capacity is increased. The EIA Directive already regulates changes and extensions to existing projects, but the new Regulation partly clashes with these:

> *1. The permit-granting process for the repowering of projects, including the permits related to the upgrade of the assets necessary for their connection to the grid where the repowering results in an increase in capacity, shall not exceed 6 months including environmental impact assessments where required by relevant legislation.*

EIAs will not be needed for all repowering projects, but where they are, it is not physically possible to complete a satisfactory EIA process in less than six months, particularly in cases where field work is needed to establish the biodiversity baseline. The public consultation alone needs to take at least 30 days, without even counting the time needed for screening, potentially scoping, writing the study, examining whether it is ready for public consultation, adjusting the study based on the comments from the authorities and the public and the approval of the study.

**Recommendation 7:** Where EIAs are needed for repowering projects, permitting authorities must prioritise the quality of the process and effective public participation over speed, in line with the requirements of the Aarhus Convention.

Another contradiction with the existing EIA Directive is that the Regulation restricts the scope of the assessment to the change or extension of the project:

> *3. Where the repowering of a renewable energy power plant, or the upgrade of a related grid infrastructure which is necessary to integrate renewables into the electricity system, is subject to a determination whether the project requires an environmental impact assessment procedure or an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU, such prior determination and/or environmental impact assessment shall be limited to the potential significant impacts stemming from the change or extension compared to the original project.*

This provision conflicts with the requirement in the EIA Directive (Annex V) to describe *'the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources'.*

**Recommendation 8:** Where EIAs are needed for repowering projects, the studies must contain the elements laid out in the EIA Directive, including the cumulative impacts with the existing part of the project.

Paragraph 4 also attempts to exempt some repowering projects from EIA screening in a way that makes little sense:

> *4. Where the repowering of solar installations does not entail the use of additional space and complies with the applicable environmental mitigation measures established for the original installation, the project shall be exempted from the requirement, if applicable, of being subjected to a determination whether the project requires an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU.*

This may look attractive at first glance, and it should be easy to tell whether additional space is used. But understanding whether the project complies with the mitigation measures originally prescribed requires a certain level of analysis. Thus, without explicitly explaining it, this provision is effectively asking Member States to introduce a whole new pre-screening procedure especially for solar repowering projects. Considering the effort and confusion this would cause, it seems more logical to stick with the existing screening process.

**Recommendation 9:** Stick with the existing screening process for solar repowering projects, where already applicable.

*Agri-solar systems can be used to protect sensitive plants. Photo: Asurnipal via Wikimedia Commons*

EIA exemption for projects in dedicated renewable or grid areas - Article 6

Article 6 states that:

> *Member States **may** exempt renewable energy projects, as well as energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity system, from the environmental impact assessment under Article 2(1) of Directive 2011/92/EU and from the species protection assessments under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC, provided that the project is located in a **dedicated renewable or grid area** for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system, if Member States have set any renewable or grid area, and that **the area has been subjected to a strategic environmental assessment** in accordance with Directive 2001/42/EC of the European Parliament and of the Council (8).*
>
> *The competent authority shall ensure that, on the basis of existing data, **appropriate and proportionate mitigation measures are applied** in order to ensure compliance with Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC. Where those measures are not available, the competent authority shall ensure that **the operator pays a monetary compensation** for species protection programmes in order to secure or improve the conservation status of the species affected.*

This represents a potentially massive derogation from the EIA Directive under very poorly defined conditions. A Strategic Environmental Assessment is in no way comparable to – or a replacement for – an EIA. This is why they are subject to two different directives, with the EIA Directive prescribing much more clearly aspects such as the scoping process, the content of the study, the public participation requirements and the access to justice requirements.

It is not clear how Member State authorities can reconcile this provision with the existing screening provisions in the EIA Directive, which foresees no similar derogations.

In addition, it is not very clear what does and does not constitute a '*dedicated renewable or grid area*'.

Nor is it clear what a *'species protection assessment under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC'* is.

In any case, implementation of this provision would breach Article 6 of the Aarhus Convention, which guarantees the right to public participation in environmental decision making on specific activities which may have a significant effect on the environment.

In addition, it is unclear how Member State authorities could guarantee the effectiveness of the provision on species protection programmes in practice. There is a danger that in some Member States these would merely resemble regulated bribes to allow projects to go ahead.

Even if they are implemented, the results and therefore appropriateness of species conservation measures will be visible only years after the renewable energy project is built. If they prove ineffective, or are not carried out to the planned extent, but the renewable energy plant is already built by then, it will hardly be practical to remove the plant.

**Recommendation 10:** We recommend that Member States do not apply this provision – after all, there is no obligation to do so.

## Additional measures to speed up renewables deployment

In recent years, several studies have examined the barriers to faster renewable energy deployment in EU countries and provided a wide range of actions which can be taken to speed up the development of sustainable renewable energy in the EU.[8] There is in fact rather limited overlap between the measures in Regulation (EU) 2022/2577 and the recommendations from these studies. Among the most common issues encountered were:

- A lack of staff capacity for permitting processes leading to long delays
- A lack of digitalisation in permitting processes
- Overly restrictive spatial planning
- Public resistance leading to lengthy legal battles

In some countries, unresolved property ownership issues are also an issue.

There is thus a need to:

- Ensure an adequate number of trained staff for environmental permitting
- Increase digitalisation and introduce one-stop shops for permitting where not yet done yet
- Speed up the utilisation of the renewable energy potential in former industrial areas and built-up areas to minimise environmental conflicts
- Avoid unnecessarily restrictive spatial planning restrictions and ensure they are proportionate in balancing the needs of people, nature, renewable energy and other economic activities.
- Ensure more, not less, public participation and early consultations in order to avoid resistance to large-scale projects later on. And promote community energy to ensure public benefits from renewable energy development.

Other measures not related to permitting, such as ensuring a predictable and consistent incentives system, are also an issue in some countries. We therefore encourage EU Member States to use the studies already done and examine for themselves ways in which the development of sustainable forms of renewable energy can be speeded up, without compromising environmental protection and public participation.

[8] For example, see *eclareon*, Öko-Institute, Wind Europe and SolarPower Europe, Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations (RES simplify): interim report, dated July 2021, published 17.05.2022, and *eclareon*, Barriers and Best Practices for Wind and Solar Electricity in the EU27 and UK, European Climate Foundation, March 2022.